SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

EASTERN INDUSTRIES CORPORATION

V. Tax Docket No. 6594-95

DISTRICT OF COLUMBIA

MEMORANDUM OPINION AND ORDER

In the instant assessment appeal, the subject property is a parcel of undeveloped realty in the middle of downtown Washington. The taxpayer complains that the subject property's assessment for Tax Year 1995 should be invalidated merely because the assessor assumed and applied an incorrect zoning designation. The taxpayer offers, as de novo evidence of fair market value, the testimony of an expert appraiser who asserts that the correct fair market value was only about one tenth of the assessed value. The District did not offer any competing, expert testimony at trial. Instead, the District stands by the original assessment and asks the Court to reject the expert's appraisal for various reasons.

Although it is not typical that the District prevails in assessment appeals without the benefit of its own expert testimony, the unique facts of this case compel the Court to reject the expert appraisal offered by the taxpayer and to affirm the original assessment. Judgment will be entered in favor of the District of

Columbia. The crux of today's decision is a conclusion that the taxpayer has not met its burden of proof by a preponderance of the evidence and that the expert's appraisal is burdened by numerous internal problems of reliability.

I. FINDINGS OF FACT

Background. The subject property is denominated as Square 283, Lot 50, and it is located (descriptively) at 1210-1216 Massachusetts Avenue, N.W., in the District of Columbia. There are no significant commercial structures on this land. It is being used as a parking lot and is paved. All public utilities, gas, electricity and telephone service are available to the site.

The tax in controversy is a real estate tax imposed against the property for Tax Year 1995 (covering the period of October 1, 1994 through September 30, 1995). The taxes in issue are the amount of $68,797.74. All payments have been made.

The District prepared and issued a notice of assessment dated February 25, 1994, in the amount of **$3,199,895**. The Petitioner did not prevail in its appeal to the Board of Equalization and Review, which was the administrative precursor to the instant appeal.

The parties stipulate to the following critical facts: (a) that the correct zoning designation for the subject property is DD/C-2-C; and (b) that the assessor relied upon an incorrect zoning district in assessing the property, and did not learn of its error until after this litigation was commenced.

The only witness who testified at trial was an expert

appraiser, who was called as the Petitioner's sole witness. The expert was Robert G. Johnson, president of the appraisal firm of Johnson, McClellan, Sullivan, and Page, of Reston, Virginia. He testified that he produced a written appraisal of the subject property at the request of his client, James P. O'Mara, who was Vice President of the Real Estate Valuation Unit of First American Metro Corporation of McLean Virginia. His appraisal sets forth his opinion of the fair market value of this property as of the date of July 25, 1993. He concluded that the fair market value of this property as of July 25, 1993 was **only $350,000.00**.

Development of the Appraisal. At the time that the appraisal was prepared, it had been commissioned by a bank that held the property in foreclosure. At that time, according to Johnson, "banks were required to get an appraisal annually for the bank-owned property in their portfolio." (Tr. at 20.)[1] The appraisal of Johnson was not solicited without conditions and limits. He proceeded under certain client-driven limitations that go to the substance of the appraisal. He testified:

> First American Bank had a guideline, had guidelines, multi-page guidelines, which were nothing more than generally accepted appraisal practice, with one exception, and that is I think at the time **they were under some pressure from Federal regulators not to, not to, let's say inflate the values, but show higher values on their books than they might because of the conditions of the real estate market.**

---

[1]The transcript citations herein ("Tr.")refer to the trial transcript.

> They wanted us to show a market value **assuming a marketing period of no longer than 12 months,** and in that environment we could not always guarantee that that value could be shown for 12 months. So this was prepared under that understanding.

(Tr. at 13)(emphasis supplied.)

After receiving information that there was parking lot income being produced by this property, the appraisal was updated. Johnson elaborated,

> [T]he way we had handled the appraisal was to **assume that the lot would be held vacant for 2 years,** and we would need to account for real estate taxes and holding costs during that time, because the market was so slow, and the bank had come back and said that if we were going to hold it for 2 years, then there would be some income during that time, and they provided us with the documentation regarding the income. We added it in, and it increased the value a little bit.

(Tr. at 14)(emphasis supplied.)

Where assessment assumptions are concerned, he testified that "the bank understood market value under pressure from regulators, to be a value that would be associated with a marketing period of 1 year or less." (Tr. at 19.)

The Role of the Correct Zoning Designation. Mr. Johnson testified that the "highest and best use" of the subject property would be "to construct a mixed-use building consisting of office and residential, probably apartments," after holding the property for a period of time to allow for market demand to increase. (Tr. at 18.) The zoning for the property was "C-2-C, with a DD overlay." This refers to "downtown development." (Tr. at 18.) He

elaborated:

> The C-2-C is a commercial zone, and the DD, downtown development overlay, requires that a certain portion of the eventual building be put to residential use, with the remaining fraction allowed to be office use, and for this particular zone, in terms of FAR, which is a multiple of the lot area, I believe it was 3.5 FAR allocated to office[], and 4.5 to residential. The total FAR, the total multiple of the lot area would be 8.0.
>
> The one stipulation is that the first 4.5 be used for residential use.

(Tr. at 18.) The term "FAR" refers to floor to area ratio. In all of his testimony, Johnson refers to valuation of undeveloped land according to FAR instead of square footage.

The incorrect zoning designation that was used by the assessor is "C-3-C." This is not a situation in which the correct zoning designation did not have any requirement that part of the improvements be residential. To the contrary, the only difference between the two zoning designations is the amount of required residential space that is involved. According to Johnson, "it would have a different mix of office and residential . . . . [because] [t]he residential component is slightly smaller, . . . 3.5 instead of 4.5. . . ." (Tr. at 82-83.)

Johnson strongly emphasized the role of the correct zoning designation as the core reason for his estimation of value. He concluded that the impact of the residential overlay in particular would translate into a market value that would be low because the entire FAR that is required to be reserved for residential development is, in his opinion, worthless.

Basically, Johnson calculated the FAR that can be developed for commercial uses. Then he concluded that $2,000,000 of the assessment was unjustified. He reasoned that no part of the assessment could be attributed to residential unit development. Thus, according to Johnson, the fair market value of this property on the date of assessment should have been at least $2,000,000 less than the assessed value. He made further downward adjustments for various reasons, and ultimately developed a valuation of $350,000.00.

The Expert's Value Analysis. In setting forth the basis of his opinion as to value, Johnson addressed several factors.

First, he placed the property in the perspective of prevailing market conditions. He explained that the Washington metropolitan area was at the time of his appraisal suffering from a "recession" in which "many of the companies scaled back in their absorption of office space, so that many of the new buildings that were left empty or nearly so, the landlords were lowering the rents, trying to lure tenants from the older buildings." (Tr. at 21.) He allowed, however, that "in 1993 we were in a period of recovery . . . [and] during 1993 the real recovery began." (Tr. at 21.)

Secondly, he considered the location of the property as to its neighborhood and adjacent areas. He found that

> the subject is located at the edge of the east -- or what we call the east end. It is at the fringe, excuse me, it is bound by L Street and Mass Avenue. There are large office buildings along L Street, but really none north of the subject. So the subject is at a fringe

> location, but still within a market that we would consider to be the office market.

(Tr. at 22.) In his written appraisal report (admitted as Petitioner's Exhibit 1, hereinafter "Report"), he noted that "[t]he boundaries of the East End sub-market are generally considered to extend from 15th Street east to 3rd Street, between Pennsylvania Avenue and approximately M Street." (Tr at 23; Petitioner's Exhibit 1 at 24.)

The expert noted at trial that

> [t]he subject property was "lying between a townhouse, which was converted to a hotel on one side, and several apartment buildings lining Massachusetts Avenue. Adjacent to the subject on the west side is another apartment building, known as Massachusetts House. In general [he added] Massachusetts Avenue is lined with a number of apartment buildings. South of the subject would be found newer buildings in the east end. It sort of is on the border between a residential neighborhood and an office neighborhood.

(Tr. at 23.)

The expert considered the three, traditional approaches to the valuation of realty, and he chose to utilize the comparative sales approach. He used three downtown properties that he regarded to be the best comparables. All three of them had been purchased at prices that exceeded the valuation that he proposed for the subject property. He provided explanations as to why those properties sold for a higher price.

First, one property (purchased by PEPCO at 1111 K Street, N.W.) commanded its price because the buyer "had to have that site because it was on K Street, and K Street was a wide street, and it

was close to where they needed to build some facility that they needed." (Tr. at 31.)

Second, a property purchased by the American Association for the Advancement of Science at 1200 New York Avenue was bought for development of an office building.

Third, the last comparable property was purchased by the World Bank at 2131 Pennsylvania Avenue also for purposes of constructing a new office building. There, the purchaser had been "motivated to take this site because it was close to the World Bank and they wanted to be at that location, it had a high profile on Pennsylvania Avenue. So no other site would do for these purchasers." (Tr. at 32.)

Johnson believes that all three of these comparable properties were sufficient to use for estimation of market value. Nonetheless, he acknowledged that sales one and three (as described herein above) were not entirely comparable to the subject property because they were not a part of the downtown development overlay area -- and were thus not burdened with the "residential requirement." (Tr. at 33). For this reason, Johnson primarily regarded sale number two as the most comparable land sale in relation to the subject property.

In creating his valuation, Johnson used the three sales to derive a range of prices per FAR of commercial space. He determined that the values fell between $79.72 and $122.77. As he indicated in his Report,

> After making adjustments for location and motivation, the comparables indicated a range

> of values for he subject of between $51.81 and $56.25 per FAR. Unfortunately,the adjustments which were made in this section are difficult to quantify, which leads us to have a lower degree of confidence in the reliability of Comparables One and Three. On the other hand, Comparable Number Two is a very good comparable, in a superior corner location. This comparable is just three blocks south of the subject, and we have placed primary reliance upon it in coming to a conclusion of the Market Value of the commercial component of the subject site, as though vacant, of $52.50 per FAR.

(Petitioner's Exhibit 1 at 64.)

Having concluded that the fair market price for usable land at the subject site was $52.50 per FAR, Johnson then had to determine how to apply this price to the property itself. He decided that although he found "a few sales" in the office building market, there was "virtually no demand and virtually no sales of land intended for multi-family residential buildings within these areas." (Tr. at 27.) His firm did a "financial feasibility study" and determined that

> for the residential component, the residential component would add, would have a contributory value, to the eventual building of approximately 4.7 million dollars, whereas its contributory cost of construction would be close to 6.7 million, which means that the imposition of the DD overlay on this site had a net impact of 2 million dollars, according to our calculations.

(Tr. at 27.)

Johnson concluded that the practical meaning of this calculation was to "apprais[e] how much someone would pay for the office FAR in order to construct an office site with a 3.5 FAR. . . ." (Tr. at 28.) It appears that he assumed that no investor

would actually ever be able to sell or lease the residential space within any building that would be erected on the subject site and that, essentially, a buyer would have to pay for part of a building that would be partly unusable.

In order to arrive at his estimation of the two million dollar negative impact, Johnson multiplied the estimated market price per FAR ($52.50) by the total square footage of the site (14,469), by the FAR (3.5). This yielded a price of $2,658,579 that he claimed a buyer would pay for the undeveloped site.

To this figure, Johnson then attempted to figure out the financial impact of buying land for the purpose of mixed-use development. Essentially, he decided that the fair market value of the undeveloped property should be adjusted downward in order to account for what he described as the "negative contribution" of the FAR that is to be devoted to residential use. He came up with a figure of $2,000,000 as the amount by which the estimated market value should be reduced.

The genesis of this $2,000,000 appears to be the following, according to the content of the Johnson appraisal report. Johnson wrote that

> [a]dding the subject's residential requirement to the difficulties of constructing office space further burdens the subject site in the eyes of the development community. In our discussions with developers and brokers, we have concluded that, at best, residential land is considered to have zero value for good residential sites. Since the subject is not considered to be a good site, it would likely be considered a negative contribution to the site.

(Petitioner's Exhibit 1 at 50.) He further observed that "[t]here is a lack of demand for the residential component at the subject site, because of the general market conditions and, more specifically, the subject's location along the north border of the East End." (Petitioner's Exhibit 1 at 50.)

Functionally, Johnson used his assumption of market disinterest in commercial development at this site to research the relative cost of building and operating residential apartment units within a mixed-use building. His appraisal report contains the details, including his market-based estimations of rent, cost of vacancy rates, expenses, etc. It suffices to say that, taking all of these factors into account, he estimated that the "negative impact" of the housing portion of such a mixed use project would be rounded to $2,000,000. The financial data that underlies this figure is set forth in a chart in his Report[2] but is not identified as anything more than a one-year snapshot of the cost of operating these units. This chart does not explicitly indicate whether the figures for rent or expenses are presumed to be for a period of one year, or some other period of time. The chart does not purport to show a trend of any kind. It is ambiguous.

II. CONCLUSIONS OF LAW

It is appropriate to recapitulate exactly what a commercial tax assessment must involve and the legal standard by which it must be judged in a trial de novo.

---

[2]Petitioner's Exhibit 1 at 51.

The District of Columbia Court of Appeals has emphasized:

> In determining the estimated market value, the assessment shall take into consideration all available information which may have a bearing on the market value of the real property including but not limited to government imposed restrictions, sale information for similar types of real property, mortgage or other financial considerations, replacement costs less accrued depreciation because of age and condition, income earning potential (if any), zoning, the highest and best use to which the property can be put, and the present use and condition of the property and its location.

District of Columbia v. Washington Sheraton Corp., 499 A.2d 109, 112 (D.C. 1985). The appellate court's observation closely follows the mandate of the Code itself, which directs that the Mayor, in assessing real property

> shall take into account **any factor which might have a bearing on the market value of the real property including but not limited to**, sales information on similar types of real property, mortgage, or other financial considerations, reproduction cost less accrued depreciation because of age, condition, and other factors, income-earning potential (if any), zoning, and government-imposed restrictions.

D.C. Code § 47-820(a) (1997 Repl.)(emphasis supplied).

A person who appraises a property for the purpose of determining its value for taxation

> may apply one or more of the three generally recognized approaches of valuation when considering the above factors. Those approaches are the replacement cost, comparable sales, and income methods of valuation. Usually the appraiser considers the use of all three approaches, but one method may be most appropriate depending on the individual

circumstances of the subject property.

Id. at 113 (citations omitted).

The "comparable sales approach" requires the comparison of "[r]ecent sales of similar property" and "the price must be adjusted to reflect dissimilarities with the subject property." District of Columbia v. Washington Sheraton Corp., supra, 499 A.2d at 113. This was the approach selected by the expert herein, and the District does not disagree that this was the most appropriate approach to valuation of this particular property.

The District of Columbia Code clearly prescribes the objective of the assessment process as the determination of the "estimated market value" of the property. This is defined as

> 100 per centum of the most probable price at which a particular piece of real property, **if exposed for sale in the open market with a reasonable time for the seller to find a purchaser**, would be expected to transfer under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains **and neither being in a position to take advantage of the exigencies of the other.**

D.C. Code § 47-802(4) (1990 Repl.)(emphasis supplied).

Based upon the following factors, this Court concludes as a matter of law that the valuation evidence produced by the Petitioner is insufficient to carry its burden of proof. It is insufficient because the expert appraisal that was performed by Johnson simply does not comply with the statutory definition of estimated market value.

First, the appraisal was (at the very outset) premised upon an

arbitrary marketing period rather than a "reasonable" marketing period.

The record herein is replete with testimony from the taxpayer's expert in which he repeatedly admits that he was attempting to conform his appraisal to the regulatory pressures that were influencing his client. He candidly admitted during his trial testimony that his "conclusion of $390,000 was constrained to a 12 month period, and if it were not constrained, it would have been. . . $660,000." (Tr. at 42.) He elaborated on why he would have given this higher value for this property, if he had been liberated to use his own independent, professional judgment.

Johnson explained that the "banks that were under pressure from the regulatory agencies did not want to hear about a number being $660,000 with a 2 to 3 year marketing period." Tr. 43. He testified further about the concept of a "reasonable" marketing period. He added:

> The definition of market value as I said, is reasonable marketing period, and different people at that time were interpreting the term reasonable to mean different things.
>
> Reasonable in some terms would mean if the market is very slow reasonable might very well be 2 to 3 years. However, it was First American's interpretation that reasonable can't be more than 1 year. So it was a hazy definition, and I just hope to clarify that point today.

(Tr. at 46.)

It is clear, then, that the appraised value derived by Johnson was predicated on a marketing period that was totally arbitrary and which is not "reasonable," as required by statute.

Second, the appraiser acknowledged that one of the underlying presumptions was that the property would be sold to a speculator -- who in this instance, by definition, would have been a buyer that would be "seeking to take advantage of the exigencies of the other" party.[3] The other party, in this case, was a bank saddled with the property as a foreclosure problem. The appraisal was not necessarily based upon the assumption that a buyer would purchase it truly in the "open market," as required by the Code.

The Code squarely requires that the estimate of market value not be influenced or compelled by an unnatural pressure on the putative buyer or seller. The appraisal of Johnson cannot meet this requirement, because this appraisal was specifically developed to form a carrying value for a distressed property. To boot, the appraiser admitted that the then-owner was especially under regulatory pressure to minimize the value of this property in its portfolio. This was a glaring factor that totally compromised the integrity of the appraisal for purposes of a tax appeal.

Third, the expert evidence is not remotely convincing when it purports to prove that the correct market value is almost **90% lower than the assessment**. This extremely low valuation is unsupported for a variety of reasons.

1. The area in which the subject property is located is in a transitional area that is on the border of a residential area. It is not totally commercial. Thus, on the evidence in this record, the Court cannot assume that the housing overlay in the zoning

---

[3]D.C. Code § 47-802(4)(1990 Repl.).

designation is as horrifying a factor as Johnson paints it to be.

2. The expert's $2,000,000 discount that he applies to his initial value is not well supported. It is not credible. The allegedly unprofitable figures for at least one year of operation of projected rental units are a very misleading basis for discounting a sales price for the entire property. They are misleading because the sales price is a one-time event. The rental figures do not allow for market changes in rent, which may occur as a developing trend many years after the sales price has been paid.

Furthermore, Johnson is not justified in assuming that the only use for the residential FAR is rental housing as opposed to the development of condominium or cooperative units. The profitability issues that apply to marketing difference ownership options are not identical.

3. In attempting to refine his basic valuation that was based upon the comparable sales approach, Johnson created a semblance of an income approach analysis to reduce his initial value. It is problematic, on this particular record, to mix these two conceptual models. Given Johnson's awareness of the bank's concern about the carrying value of the property, his reason for using this unusual tactic can be inferred. He appears to have been stretching to find a way to eviscerate his basic estimated sales figure of $2,658,697.

4. The expert appeared to premise his final valuation on the assumption that the residential overlay **alone** is responsible for the dramatically poor value of this property. The Johnson **basic**

appraisal figure ($2,658,687) and the original assessment ($3,199,896) are actually not far apart. There is only a difference of $541,206. The pivotal factor that ratchets his appraisal downward seems to be Johnson's insistence that the estimated price per FAR should **only** be applied to the portion of potential improvements that could be used for commercial purposes. His "commercial only" theory is unjustified for several reasons.

One, it is premised upon the assumption that any developer who would build on the subject land would not be able to profit at all from the residential portion of the improvements. Johnson fails to recognize that the housing overlay affects the entire DDD area -- not merely this one property. In other words, all undeveloped or newly renovated cohort properties in the same part of downtown would be equally affected by the housing overlay -- whatever that might mean. Thus, over time, the subject property would not exist alone as a bizarre development that is permanently out of sync with the neighborhood. It would not always be consigned to compete with "all office" properties.

Two, the "commercial only theory" flies in the face of the statutory requirement that the entire property be taxed. Taxes cannot be levied only upon a portion of a property that is thought to be most popular or profitable.

The assessment of real property is made by defining the subject property by its "plat on the records of the District of Columbia Surveyor according to the lot and square together with improvements thereon." D.C. Code § 47-802(1). This is the

longstanding tenet of taxation of realty in the District of Columbia. Realty is not taxed based upon street address or any other subjective notion of what ought to be taxed.

In applying the Code definition of "property," the District of Columbia Court of Appeals has recognized that "if a lot has an improvement on it, the total property consists of land and an improvement." 1111 19th Street Assoc. v. District of Columbia, 521 A.2d 260, 270 (D.C.), cert. denied, 484 U.S. 927 (1987). Thus, it is totally improper to tax a property in piecemeal fashion, as Johnson has done in his appraisal. The subject property must be assessed as a whole, identifying separately the value of land and improvements thereon. D.C. Code § 47-821(a)(1981). The reference to improvements means the entirety of the improvements, whatever that might be.

5. Even if there is nothing wrong with Johnson's "commercial only" theory, the Court cannot credit the accuracy of the expert's FAR estimate price of $52.50. His comparison of comparables is based upon unhelpful data. Johnson admitted that none of his comparables was actually an analogous property. He had little from which to choose for purposes of conducting the full, comparable sales approach calculations. He came close to mere guessing, to the extent that he found only three properties that were vaguely "comparable," and he ultimately rejected two of the sales as being too unique as to buyer motivation. Also, comparables Two and Three were not subject to any residential overlay requirement at all. (Tr. at 33-34.)

Ultimately, the Court as a finder of fact applies logical inferences to reach a conclusion that the original assessment should be affirmed.

While it is true that this Court deemed the original assessment to have been "flawed," the Court is still obligated to determine the de novo value of the property for taxation purposes. The Court cannot adopt the value that is proposed by Petitioner. The Court's factfinding authority, after a full trial, is that the Court "may affirm, cancel, reduce, or increase the assessment." D.C. Code § 47-3303 (1997 Repl.).

Even though the Court initially found that the original assessment was "flawed" because of the use of an incorrect zoning designation, this Court concludes upon the record as a whole that the assessment still should be affirmed. Consideration of the total record convinces this Court that the flaw was not a fatal one.

It is significant that the District's assessor did not ignore the factor of the requirement for residential development. To the contrary, the assessor did indeed use a zoning assumption that recognized the housing overlay. The difference in the assessment and a properly executed appraisal should only be a matter of degree, if they are different at all.

Using the expert's estimate sale price per FAR ($52.50), applied to the full square footage and the **entire** FAR (8.0), the fair market value of the property would be calculated to be $6,076,980. This is almost twice the assessed value. There is, of

course, an issue about reducing this very high figure, and the overall problem of the housing overlay easily qualifies as a reason for doing so to some extent.

Recognizing that the housing overlay does impose **some** negative effect on the value of the property as of the assessment date, the District's assessment still falls well within the range of being a fair "estimate" of value. An estimated value need not be calculated to the dollar or the dime.

It is not difficult for the Court to reach a conclusion that the District's assessment is within a range of reasonable values, because using the expert's estimated sales price per FAR ($52.50) applied to the full square footage and the **entire** FAR (8.0%), the fair market value of this property could be calculated to be millions of dollars higher than the assessment. The Court will be cautious in not rushing to increase the assessment, however, because of the lack of more precise evidence as to the impact of the housing overlay. Moreover, the expert's price per FAR is too high.[4]

---

[4]Based upon historical information contained in Johnson's appraisal report, the Tax Years preceding Tax Year 1995 resulted in a decline in assessed value, primarily due to a successful appeal to the Board of Equalization and Review as to the assessment for 1993. The assessment for Tax Year 1992 was $12,697,088. For Tax Year 1993, the Board appeal resulted in a final assessment of $3,199,973 (whereas the proposed assessment for that year had been $10,497,040). The assessment for Tax Year 1994 reflected only a minor proposed change. Thus, in light of recent history, the assessment for Tax Year 1995 was lower than the last estimate coming from the Board. The taxpayer seems to have benefitted from changes effectuated through the process of Board appeals. For Tax Year 1995, the District had not sought to initiate any sharp, upward spiral in tax liability. Since there is no indication that the correct zoning designation for the Subject property has changed

The concept of burden of proof is highly important in the instant case. The Petitioner bears the burden of proving that the assessment must be reduced. Johnson did not purport to know how the assessor wove into his assessment the factor of a different portion of residential space (as reflecting in the erroneous zoning category). Petitioner may or may not have learned this information during discovery. Nonetheless, Petitioner has never established a causal connection between the assessor's incorrect zoning label and the actual assessment itself. The true role of the incorrect zoning designation is a missing link in the story of what influenced the assessor to make his decision. That "missing link" may or may not have supported the Petitioner's position.[5]

The original assessment should be affirmed. This is the Court's de novo decision as to value. The Petitioner has failed to meet its burden of demonstrating by a preponderance of the evidence that this property was worth only $350,000 or that the property was not worth at least as much as the assessment. The assessment,

---

since 1993, this historical information suggests that the use of an incorrect zoning label was not necessarily responsible for the particular assessment in Tax Year 1995. The Court does not rely upon this theory, however.

[5]The Petitioner implies that the use of the incorrect zoning is the only rational explanation for the assessment. Yet, the Court cannot engage in rank speculation that nothing else mattered. The Petitioner seems to take the position that if any flaw is found in a tax assessment, the trial Court has no choice but to accept and adopt whatever valuation is then proposed by the Petitioner -- if the Government does not offer a competing expert appraisal. There is no such limitation upon the Court's role as the finder of fact. The Court is not required to accept and adopt a valuation that has worse flaws than the assessment itself. That is the problem in the instant case.

otherwise, has not been shown to be substantially unreliable despite its superficial flaw as to the zoning category. In the end, this is not a close case.

WHEREFORE, it is by the Court this 13th day of November, 1998

ORDERED that judgment shall be entered in favor of respondent. The original assessment is affirmed.

Cheryl M. Long
Judge

Copies mailed to:

Joseph F. Ferguson, Esq.
Assistant Corporation Counsel
441 Fourth Street, N.W.
Washington, D.C. 20001

Richard W. Luchs, Esq.
Counsel for Petitioner
1620 L Street, N.W., Suite 900
Washington, D.C. 20036

Claudette Fluckus
Tax Officer - FYI

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

EASTERN INDUSTRIES CORP.

Petitioner

v. Tax Docket No. 6594-95

DISTRICT OF COLUMBIA

Defendant

MEMORANDUM OPINION AND ORDER

This case commenced trial before this Court on November 19, 1996. This is an appeal from an assessment of real property taxes on a parcel of unimproved land, located at 1210-1216 Massachusetts Avenue, N.W. in the District of Columbia. This land is being used as a parking lot. The Petitioner was pursuing its right to a trial de novo, following an unsuccessful appeal before the Board of Real Property Assessment and Appeal.

At the close of the Petitioner's case-in-chief, the District of Columbia moved for entry of judgment in favor of the Respondent, on the grounds that the Petitioner had failed to prove that the original assessment was incorrect or flawed.

The Court heard oral argument on this motion and took the matter under advisement. Soon thereafter, counsel for all parties filed further pleadings on this issue.

For the reasons that follow herein, this Court concludes that

the Government's motion is meritorious. Judgment shall be entered in favor of the District of Columbia.

I. Applicable Law on Assessment Appeals

The law of the District of Columbia mandates that real property assessments reflect the estimated market value of the property as of a specific date, i.e. the date of the assessment. Each tax year the valuation date is January 1st of the preceding calendar year. Moreover, the applicable statute explicitly defines what is meant by estimated market value:

> 100 per centum of the most probable price at which a particular piece of real property, if exposed for sale in the open market with a reasonable time for the seller to find a purchaser, would be expected to transfer under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other.

47 D.C. § 802(4) (1990 Repl.).

The District of Columbia Court of Appeals has emphasized, "[i]n determining the estimated market value, the assessment **shall take into consideration**:

> all available information which may have a bearing on the market value of the real property **including but not limited to** government imposed restrictions, sale information for similar types of real property, mortgage or other financial considerations, replacement costs less accrued depreciation because of age and condition, income earning potential (if any), **zoning**, the highest and best use to which the property can be put, and the present use and condition of the property and its **location**.

District of Columbia v. Washington Sheraton Corp., 499 A.2d 109, 112 (D.C. 1985) [emphasis supplied]. The quoted factors above are found directly in the District of Columbia Code. 47 D.C. § 820(a).

The assessor is required, as a practical matter, to develop an assessment figure that mirrors as closely as possible the value that a potential buyer, in the open market, would also place on the property. This, in turn, means that the assessor cannot logically ignore the very same factors that would normally have an impact on a purchaser's decision to buy the property.

The Court, in examining the assessment de novo, is obliged to engage in a two-step process.

First, the Court must determine whether the petitioner has established by a preponderance of the evidence that the particular assessment is "flawed." Brisker v. District of Columbia, 510 A.2d 1037, 1039 (D.C. 1986).

The District of Columbia Court of Appeals has emphasized that "a taxpayer bears the burden of proving that an assessment is incorrect or illegal, not merely that alternative methods exist giving a different result." Safeway Stores, Inc. v. District of Columbia, 525 A.2d 207, 211 (D.C. 1987).

Second, if the Court is convinced that the assessment is flawed, the Court itself must then render its own decision on the fair market value of the property. The petitioner is not then strictly required to present proof of the "correct" value, though typically this is exactly what petitioners endeavor to do. The Court, as the finder of fact, may accept either party's competing

evidence as to value or the Court may seek further input from one or more independent experts.

A person who appraises a property for the purpose of determining its value for taxation

> may apply one or more of the three generally recognized approaches of valuation when considering the above factors. Those approaches are the replacement cost, comparable sales, and income methods of valuation. Usually the appraiser considers the use of all three approaches, but one method may be most appropriate depending on the individual circumstances of the subject property.

Id. at 113 [citations omitted].

The "comparable sales approach" bases assessed value on the price or prices at which reasonably comparable properties have recently sold, in accordance with the following guidelines:

> (a) Sales which represent arm's length transactions between buyer and seller shall be used in analyzing market value. Sales which do not represent arm's length transactions shall either be adjusted for differences or disregarded;
>
> (b) Sales comparisons should be made by property type within an assessment area; Provided, that if sufficient sales data for an assessment area is not available, sales data from other similar areas may be used.

9 DCMR § 307.3.

In the instant case, no party disputes the principle that the most appropriate approach to value is the comparable sales approach. It would certainly appear that the other two alternative approaches to value should only be used for improved properties, such as office buildings.

II. PETITIONER'S EVIDENCE AT TRIAL

It is undisputed that the original tax assessment that is in issue was based upon the assessor's determination that the estimated market value of this property for tax year 1995 was $3,199,895.00.

One witness was called by the Petitioner in its case-in-chief, Mr. Robert G. Johnson. This witness was qualified as an expert in real estate appraisal.

The Court admitted into evidence Johnson's written appraisal report that set forth in detail the basis for the expert's own valuation of this property. Johnson testified at length concerning various aspects of his work. The Petitioner contends that the fair market value of this property is the value that was derived by Mr. Johnson, i.e. no more than $660,000.00.

The assessor was not called as a witness for the Petitioner for any purpose.

For the sake of brevity, it is not necessary to recount the full details of the expert's testimony. Rather, it suffices to say that Johnson explained that he principally relied upon the comparable sales approach to value. He recounted, step by step, how he analyzed various sales of comparable property in order to arrive at his estimated fair market value for the subject property.

It is undisputed that the correct zoning designation for this property is DD/C-2-C.

It is also undisputed that the tax assessor assumed that the zoning designation for this property was something other than the

correct one, i.e. he assumed that it was DD/C-3-C.

The salient difference between the two designations is the extent to which certain portions (ratios) of the property, if improved, may be used (or must be used) for residential use or retail use.

In his trial testimony, Mr. Johnson admitted that he knew nothing about how the assessor derived his valuation.

III. ANALYSIS OF THE INSTANT MOTION

The state of the record at the close of Petitioner's case must be judged according to what the law requires the Petitioner to prove in a de novo trial.

The keystone of the problem with the Petitioner's case is that Petitioner never called the assessor to testify, albeit as an adverse witness, in order to elicit from him precisely how he constructed his assessment. Moreover, the expert himself did not purport to know the mental process or method by which the assessor derived his value.

It is absolutely essential for a Petitioner to bring forth specific testimony as to how the assessor applied or misapplied a particular approach to value. Without such testimony, the Court would be required to speculate as to how the process went wrong.

Typically, in trials of assessment appeals, the Petitioner does indeed call the assessor as a witness, usually as a prelude to calling any expert witness. In this way, the factual predicate for

the assessment is fully revealed on the record.[1] There is no doubt as to what the assessor did and what he thought he was doing when he actually went through the steps of developing the assessment.[2]

The Code itself creates an unrestricted list of factors that an assessor may utilize in arriving at an assessment. The Code certainly articulates some well-recognized elements, such as zoning, location, sales information, etc.

The Code also warns that this list is not exhaustive. Thus, unless the Petitioner elicits testimony about what the assessor specifically did in making his calculations and performing his research of the property and the market, no one can say with any assurance that the end product, i.e. the assessment figure, is flawed or incorrect.

Here, the Petitioner makes an unjustified leap. Petitioner broadly assumes that since the assessor mistakenly believed that the zoning designation was something other than the correct one, that **this alone** accounted for the particular value that underlies the assessment. There is no basis for such an assumption.

While the assessor may have assumed this mistaken zoning category, there is no way to eliminate the possibility that some other factor was actually more important to him -- and that such

---

[1]This Court has presided over many tax appeals and the instant case is the only tax trial before this Court wherein the Petitioner did not call the assessor as its first witness.

[2]This is important because it is not unusual for assessors to give trial testimony that indicates that they only belatedly realize that they were mistaken about the proper application of an analytical model or some other aspect of their assessment process.

other factor(s), in the assessor's mind, exceeded the importance of the zoning.

The instant case presents a unique situation in which the Petitioner has done no more than to prove (without dispute) that the assessor was working with some wrong information. However, the Petitioner produced no evidence tending to demonstrate the unambiguous, causal connection between the particular assessment figure and the mistaken information on zoning designation.

To be sure, where an office building property is the subject, rather than unimproved land, there may be potentially many more factors in the assessment equation. Yet, this Court cannot fairly assume, as the Petitioner implicitly contends, that the **sole** factor of zoning designation drives the final assessment figure process and controls the particular value of the property. This is an especially questionable premise where, as here, the two competing valuations are so wide apart.

This Court has carefully examined an appellate decision cited by the Petitioner, highlighted to argue that placement of the burden of proof upon the taxpayer does not mean that "where the taxing authority and the taxpayer are in full agreement as to the method to be used in assessing a particular type of property, and differ only as to a factual element in the application of that method, the Tax Court, after receiving evidence with respect to this different and resolving it by a specific finding, must then allow the concededly faulty assessment to stand because the taxpayer has not proven that it is not 'fair cash value.'" Pepsi-

Cola Bottling Co. v. District of Columbia, 119 U.S.App.D.C. 73, 76, 377 F.2d 109, 112 (1964).[3]

In Pepsi-Cola, it is true that the tax assessor and the taxpayer differed only as to one discrete factual element in their competing determinations of value. However, Pepsi-Cola is inapposite here, because in Pepsi-Cola the tax assessor did indeed testify in court and the true extent of his departure from the Petitioner's method of assessment was not left to doubt or speculation. The Court of Appeals noted,

> The parties initially confronted each other in the Tax Court, therefore, with no division between them as to the method used to ascertain the taxable value of the machines. They parted company only over the question, in applying that method, of the appropriate measure of average useful life and residual value. The evidence adduced in the Tax Court was directed to that issue. After the hearing was completed, the Tax Court made specific findings that the machines had an average useful life of six years and a residual value of eight per cent.

Id. at 75, 337 F.2d at 111. While it is not clear from the appellate opinion whether the assessor was used as a witness by the taxpayer or by the District, the salient fact is that his sworn testimony was before the Court and he was subject to cross-examination and the full scrutiny of the trial court.

The possible cause of the Petitioner's failure to call the assessor as a witness in the instant case is revealed in one particular statement in Petitioner's written opposition to the

---

[3]Pepsi-Cola did not involve real property. Rather, the issue focused upon the value of vending machines.

Motion to Dismiss. Therein, counsel opposes the Government's position, stating:

> The District, however, invites the Court to adopt the standard rejected in Pepsi-Cola Bottling Co. by requiring Petitioner to either (a) show that the Property should be assessed on a different basis or (b) present the District's case for it, and then show where it erred.

Memorandum in Opposition of Respondent's Motion to Dismiss, at page 4 (emphasis in original).

The underscoring of the reference to proving the District's case "for it" is a telling sign that the Petitioner equates the presentation of an adverse witness with the nettlesome obligation to gratuitously prove the opposing party's case. This analogy is wrong.

In any tax assessment appeal, a Petitioner must somehow address the necessity of proving the **historical** facts as to how the assessment process transpired. The most obvious method for doing so is to call the assessor as an adverse witness. Eliciting testimony as to the steps taken by the assessor is never interpreted by the Court -- or the District -- as a signal that the Petitioner thereby vouches for the accuracy or credibility of what the assessor did. Perhaps, this is what concerns the Petitioner.

To the contrary, the use of an adverse witness presents a helpful (and essential) opportunity to ask leading questions to reconstruct exactly what went wrong or what was improperly omitted,

misconstrued, or forgotten by the assessor.[4] Requiring the assessor to recapitulate what he did is exactly what must be done. The level of detail is a discretionary matter with the Petitioner, so long as the Petitioner makes the necessary point in proving that the assessment was incorrect.[5]

The mere fact that another appraiser developed a lower valuation does not necessarily mean that the original assessment was incorrect.

Appraisal of real estate is a subject area in which reasonable minds can differ, even when identical data is available to different appraisers. The differences evolve when they do different things with the data, when they forget to use it, or when they incorrectly manipulate it.

This Court recognizes that in an unusual case, it might be possible to prove that an assessment was flawed by presenting some extrinsic evidence that effectively reveals an act or omission by the assessor that need not come from the lips of the assessor. Hypothetically, for example, a taxpayer may be able to prove that the assessment was flawed by showing that the improvements to land had been destroyed by fire prior to the assessment and could not

---

[4]When an assessor has been deposed prior to trial, this procedure of calling the adverse witness can be planned and tailored to the testimony that is actually needed, with few surprises if any. This Court does not know whether the assessor was deposed prior to trial in the instant case. However, counsel has not complained that the Petitioner did not have this advantage. In the present case, the assessor was available.

[5]As a procedural matter, the District has the opportunity to call the assessor back to the witness stand in its defense, as it so chooses.

have existed for purposes of inclusion in the assessment (which, necessarily, would have reflected separate elements of land and improvements). Such extreme situations rarely occur, however. The typical scenario is never that simple.[6]

In retrospect, the Petitioner herein has failed to establish a prima facie case that the assessment was flawed or incorrect. This Court need not, and should not, delve into the merits of the expert's opinion that is already in the trial record. It is totally unnecessary to determine if the expert's opinion is worthwhile in order to determine that the Petitioner never crossed the first hurdle of its burden of proof. There is no need to re-open the record.[7]

WHEREFORE, it is by the Court this 18th day of February, 1997

ORDERED that Respondent's Motion to Dismiss (or for judgment) is granted; and it is

---

[6]This Court has found that when assessors are called as adverse witnesses (which is the norm in tax trials), the results are rather specific for the Petitioner. Two good examples are seen in the decisions of Rose Associates v. District of Columbia, Tax Docket Nos. 5258-92 and 5772-93 (November 30, 1995)(Long, J.) and Square 118 Associates v. District of Columbia, Tax Docket No. 4508-90 (January 3, 1996)(Long, J.). In Rose Associates, the assessor was called in the Petitioner's case and admitted that he had failed to consider sales of comparable properties as part of determining a capitalization rate, using the income capitalization approach to value. In Square 118 Associates, the assessor was called as Petitioner's witness and admitted numerous errors in the assessment, including the defective application of the "mortgage equity technique" in performing the income capitalization analysis.

[7]Petitioner, in its Opposition, makes a reference to the Court's discretionary power to re-open the record. However, this is an oblique bid to gain an opportunity to re-present its case or to cure the defective quality of its trial presentation.

FURTHER ORDERED that judgment is entered in favor of the District of Columbia.

Cheryl M. Long
Judge

Copies mailed to:

Joseph F. Ferguson, Esq.
Assistant Corporation Counsel
441 4th Street, N.W.
Washington, D.C. 20001

Richard W. Luchs, Esq.
1620 L Street, N.W., Suite 900
Washington, D.C. 20036

Claudette Fluckus
Tax Officer [FYI]